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Terri E. Owens

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The Abortion Question: Germany's Dilemma Delays Unification

As a reunified Germany begins to jell, one divisive topic remains to be settled. This issue is abortion. East German law freely permitted abortion on demand within the first three months of a pregnancy. West Germany allowed abortions only if a woman met one of four criteria: endangerment to the mother's health, risk of damage to the child, pregnancy as a result of rape, or a life situation that would make raising a child difficult.

In the summer of 1992, the German Parliament, the Bundestag, voted to extend the liberal abortion law of East Germany to all of Germany and to add a restriction that women were required to obtain counseling at least three days before obtaining the abortion. This legislation was signed into law by German President Richard von Weizaecker. However, the German Constitutional Court issued a temporary injunction blocking the new law on the day before it was to go into effect, due to a petition submitted which alleged the new ruling was unconstitutional because it violated the German Constitution's provision guaranteeing protection of human life. After two days of arguments in December 1992, the Federal Constitutional Court announced it was postponing its decision until August 4, 1993. Until the ruling is issued, Germany, politically united since October of 1990, will remain separated on the issue of abortion.

A comparison of constitutional and legislative solutions to the abortion question is necessary to discover a resolution to the crisis facing Germany. West Germany and Canada are examples of two countries in which antithetical constitutional approaches to the abortion problem were formed. Countries in which the abortion question has been managed legislatively must also be examined. Finally, a solution to the crisis facing Germany will be proposed after an evaluation of the competing

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interests involved in the abortion question and an analysis of these interests in providing a long-term solution for Germany.

I. WEST GERMANY AND CANADA: CONSTITUTIONAL PROHIBITION AND PROTECTION OF THE ABORTION RIGHT

The definition of a constitutional right must first be established to distinguish such rights from those derived legislatively. According to Black's Law Dictionary, a constitutional right is "a right guaranteed to the citizens by the United States Constitution and state constitutions and so guaranteed as to prevent legislative interference therewith." A broader definition is necessary for purposes of analysis of the abortion right in a multi-national context. A definition of constitutional right as one that cannot be removed or modified by legislation is appropriate to begin an examination of the resolutions to the abortion question proposed by West Germany and Canada.

A. West Germany

Commencing with the midpoint of the nineteenth century, the German states distinguished abortion as an independent crime from the killing of a newborn. Germany's abortion law originated from sections 181 and 182 of the Criminal Code for the Prussian State of 1851 which prohibited a woman from having an abortion. This provision remained in effect until the law of 1926, which softened the criminal penalties for abortion by exempting the woman from prosecution for obtaining an abortion. The criminal penalties for abortion were again sharply increased and extended to women during the Third Reich due to the passage of the Regulations for the Protection of Marriage, Family, and Motherhood of 1943. In 1969, the latest provision was enacted to continue the imposition of criminal penalties on the woman.

8. Section 181 reads, "A pregnant woman who intentionally aborts the fetus or kills it in the womb, shall be punished with a term of up to five years in the house of correction. Should extenuating circumstances be present, punishment shall be for not less than six months. The same provisions apply to anyone who, with the consent of the pregnant woman, provides the means for abortion or killing; or procures same for her."
10. Id.
11. The 1969 Law reads, "A woman who destroys her fetus or permits it to be destroyed by another shall be punished by imprisonment, and in especially serious cases by confinement in a penitentiary. The attempt is punishable. Any other person who destroys the fetus of a pregnant woman with a drug or object designed to destroy the fetus, shall be punished by imprisonment, and in especially serious cases by confinement in a penitentiary."
West Germany consisted of a federal republic composed of ten states, and the making of abortion policy fell exclusively within the jurisdiction of the national government. In 1972, the Bundestag passed the Abortion Reform Act which would have made abortion legal in the first twelve weeks of pregnancy if the woman first obtained counseling intended to discourage her from obtaining an abortion. The Reform Act was not brought as a defense of a woman’s right to interrupt a pregnancy, but rather was based on a theory of deterrence. The counseling section of the new law was regarded as a more effective means of deterring pregnant women from obtaining an abortion and of protecting an unborn life than a resort to criminal penalties.

The Act was immediately brought before the German Federal Constitutional Court for review. The Federal Constitutional Court invalidated section 218(a) of the Abortion Reform Act and directed the German Parliament, in effect, to reestablish abortion as a crime under the Penal Code.

Invoking article 2, section 2 of the Basic Law, the court held that the right to life embodied in the Basic Law was intended as a reaction against the extermination of “unworthy” life carried out during the time of the Third Reich. The court found that “Life, in the sense of the historical existence of a human individual exists according to definite biological-physiological knowledge in any case from the fourteenth day after conception.” Thus, the court extended the guarantee of article 2, section 2 of the Basic Law to born as well as “unborn life.” Once the court established that “unborn life” was included in the conception of “everyone” in article 2 of the Basic Law, the court determined that the fetus was entitled to protection not only from the state, but from third parties as well.

The German decision is even more interesting in light of other provisions of the German Constitution. Pregnancy belongs to a woman’s

13. Section 218(a) of the Abortion Reform Act provided that an abortion is not punishable if advisable to avert a danger to the pregnant woman’s life or the danger of grave interference to her health and the danger cannot be averted by other reasonable means, or strong reasons argue that the child, owing to a hereditary disposition or harmful influences before birth, would suffer from irreparable injury to its state of health which would be so severe that the continuation of the pregnancy could not be demanded of the pregnant woman.
16. Art. 2, § 2 of the German Basic Law states, “Everyone shall have the right to life and to inviolability of his person.”
realm of privacy constitutionally guaranteed in Article 2, Section 1.\textsuperscript{17} This right is combined with the guarantee of dignity in article 1, section 1 of the Basic Law.\textsuperscript{18} However, the court rejected the idea that the woman’s decision to destroy a fetus, once pregnancy has occurred, deserved the same constitutional protection as her decision not to become pregnant in the first place.\textsuperscript{19} The court concluded that the woman’s right to free development of her personality included the right to decide against parenthood and the duties growing out of it, but this right was not unrestricted when involving the rights of others, the constitutional order, and the moral law.

The German Constitutional Court did not view the fundamental issue as whether a woman has a constitutionally based right to an abortion. Instead, the issue considered by the court was that human life, including fetal life, requires protection, and the decision was whether the legislature had chosen means that would best protect human life.\textsuperscript{20}

The court found the Abortion Reform Act to be constitutionally defective on two grounds. First, it failed to expressly embody an official disapproval of abortion during the first twelve weeks of pregnancy. Second, when combined with an amendment providing that the state would pay for the abortion, it was an unlawful encouragement to women wishing to terminate their pregnancies.\textsuperscript{21}

An international law case arose from the decision of the Federal Constitutional Court. Two West German nationals filed a formal complaint with the European Commission on Human Rights alleging that the court’s decision violated certain provisions of the European Convention for the Protection of Human Rights and Fundamental Freedoms. The German government defended the decision on two grounds: proscribing a woman from obtaining an abortion does not interfere with her right to privacy since other means of family planning are available, and interference with the right to privacy in order to prevent a crime is permissible under Article 8(2) of the Convention.\textsuperscript{22} The Commission, in its decision on the merits, did not find a breach of article 8 of the European Convention because the claim to respect for private life is automatically reduced to the extent the individual brings his private life

\textsuperscript{17} Art. 2, § 1 provides, “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.”

\textsuperscript{18} Art. 2, § 1, of the Basic Law provides, “The dignity of man shall be inviolable. To respect and protect it shall be the duty of all state authority.”

\textsuperscript{19} Kommers, \textit{supra} note 12, at 269.

\textsuperscript{20} Morris, \textit{supra} note 14, at 164.

\textsuperscript{21} Kommers, \textit{supra} note 12, at 270.

\textsuperscript{22} Aaron E. Michel, \textit{Abortion and International Law: The Status and Possible Extension of Women’s Right to Privacy}, 20 J. Fam. L. 241, 247 (1981-82).
into contact with public life or with other protected interests. In addition, the Commission reasoned that not every regulation of the termination of unwanted pregnancies results in an interference with the right to respect the private life of the mother. 23

B. Canada

The earliest Canadian statutory prohibition against abortion derived from an 1869 statute based on England's Offenses Against the Person Act. 24 The Canadian government attempted in 1969 to achieve a compromise solution to the abortion debate with a reform intended to satisfy both pro-life and pro-choice factions. The reform introduced an exception that provided for the performance of legal abortions when approved by a designated therapeutic abortion committee as necessary to preserve the life or health of the mother. If the woman did not meet the statutory exception, she and the person performing the abortion were subject to imprisonment under the Canadian Criminal Code. 25

The Canadian Supreme Court recently invalidated these Criminal Code provisions in the case of Regina v. Morgentaler "as infringing on a woman's right to security of the person in derogation of principles of fundamental justice contained in the Canadian Charter of Rights and Freedoms." 26 At the time of Morgentaler, Canadian abortion law had been stable for over two decades. 27 Application of the abortion law had changed, but this change was attributed to the varying interpretations of medical professionals, rather than the differing opinions of the courts. 28

23. Id. at 249.
25. Section 251 of the 1987 Canadian Criminal Code reads in part,
(1) Every one who, with intent to procure the miscarriage of a female person, whether or not she is pregnant, uses any means for the purpose of carrying out his intention is guilty of an indictable offense and is liable for imprisonment for life.
(2) Every female person who, being pregnant, with intent to procure her own miscarriage, uses any means or permits any means to be used for the purpose of carrying out her intention is guilty of an indictable offense and is liable to imprisonment for two years.
(3) In this section, "means" includes (a) the administration of a drug or other noxious thing, (b) the use of an instrument, and (c) manipulation of any kind.
28. Id.
The decision in Morgentaler was unusual because neither party was a woman who alleged that she had been unable or delayed in obtaining an abortion. Instead, the claim of violation of the rights of women was brought by medical practitioners whose business had been interrupted.29

The central issue before the court was whether the abortion provisions of the Criminal Code infringed on the Canadian Charter guarantee of the "right to life, liberty, and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice."30 The court focused on the psychological stress on the woman of being subject to criminal sanctions and the inaccessibility of the therapeutic abortion exception. The court found that "state interference with bodily integrity and serious state-imposed psychological stress, at least in the criminal law context, constitutes a breach of security of the person."31 The court thus went beyond the traditional limited interpretation of "life, liberty, and security of the person" to recognize an area of emotional and physical integrity with which the state could not constitutionally interfere.32 Although this concept of freedom from state interference approaches the notion of privacy, the court declined to interpret the right in this broader sense.33 In effect, the court read Section 7 of the Charter to protect against the invasion of emotional and physical integrity that resulted from arbitrary application of the therapeutic abortion exception.34

After Morgentaler, the abortion question was raised in another decision, Borowski v. Attorney-General.35 Mr. Borowski obtained standing to bring a case before the Supreme Court of Canada to argue the fetus had a right to life on the basis that he had "a genuine interest as a citizen in the validity of the legislation and that there is no other reasonable and effective manner in which the matter may be brought before the court."36 As plaintiff, he alleged that unborn children are included within the meaning of the term "individuals" in the Canadian Bill of Rights, that the amendments do not make any provisions for

30. Regina, 1 S.C.R. 30.
31. Id. at 32.
32. Id. at 37.
33. Id. at 38.
34. Id. at 33-34; Canadian Charter of Rights and Freedoms, Constitution Act 1982, part I, § 7 provides, "Everyone has the right to life, liberty, and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice."
the abortion committees to consider the life or health of the unborn, that the procedures of the committee deprive the unborn of a fair hearing, and that the unborn are denied their fundamental right to life.\textsuperscript{37} The Supreme Court of Canada declared the \textit{Borowski} case moot because the law Borowski was challenging, the Criminal Code provision allowing access to abortion, had been struck down in \textit{Morgentaler}.\textsuperscript{38}

The Canadian Senate attempted in 1991 to remedy the state of so-called "lawlessness" which existed after the \textit{Morgentaler} decision. The proposed Bill C-43 attempted to impose the threat of criminal sanctions in order to discourage pregnant women from obtaining abortions and to eliminate the right of Canadian women to have unrestricted access to medical facilities in order to obtain abortions.\textsuperscript{39} The bill was defeated, but it is the opinion of more than one writer that another proposal to criminalize reproductive choice may well be made in the future.\textsuperscript{40} Such action would be particularly surprising considering the conflict it would pose to the constitutional principles enunciated in \textit{Morgentaler}. However, Section 1 of the Canadian Charter, which provides that all rights in Canada are subject to the reasonable limits of a free society, may furnish fertile ground for another challenge placing restrictions on the ability of Canadian women to obtain abortions.\textsuperscript{41} In addition, Section 33 of the Charter permits Parliament to make laws that will infringe on rights guaranteed under the Charter, and Section 7 provides that rights may be infringed upon in accordance with principles of fundamental justice.\textsuperscript{42}

\begin{thebibliography}{9}
\bibitem{37} \textit{Borowski}, 1 S.C.R. 342.
\bibitem{39} C-43 2d Session, 34th Legislature, 1st Reading, Nov. 3, 1989: In parts of Canada, doctors or hospitals have refused to perform abortions, making them unavailable to women without the psychological and financial resources to travel. This issue was discussed in Nicholas Bala and Martha Bailey, \textit{Canada: Controversy Continues Over Spousal Abortion and Support}, 29 J. Fam. L. 303 (1990-91).
\bibitem{41} Section 1 of the Canadian Charter of Rights and Freedoms reads, "The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstratably justified in a free and democratic society."
\bibitem{42} Section 33 of the Canadian Charter of Rights and Freedoms provides:
\hspace{1em} (1) Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this Charter.
\hspace{1em} (2) An Act or a provision of an Act in respect of which a declaration made under this section is in effect shall have such operation as it would have but for the provision of this Charter referred to in the declaration.
\hspace{1em} (3) A declaration made under subsection (1) shall cease to have effect five
Thus, Canada, through the judicial repeal of its Criminal Code provisions restricting abortion in the \textit{Morgentaler} decision, experienced dramatic change in its policy on abortion. In the coming years, Canada may again see attempts at change, similar to the failed Bill C-43, due to the inability to reach a solution to the abortion question.

II. \textbf{Legislative Solutions to the Abortion Question}

For purposes of analysis, a legislative right is defined as one which is provided for and may be modified by ordinary legislation. Many countries have chosen to deal with the abortion question by providing legislative solutions for their citizens. The following countries will be examined in this context: the former Soviet Union, India, Australia, China and Israel.

\textbf{A. The Former Soviet Union}

The history of Soviet legislation on abortion can be divided into four periods: prior to 1920 when abortion was illegal, 1920-1936 when abortion was legal with some restrictions, 1936-1955 when abortion was illegal with some exceptions, and 1955-present when abortion has been legal with exceptions.\(^{43}\) The Soviet Union liberalized its law in 1955 to achieve two purposes: to reduce the harm done to the health of women by abortions performed at non-state hospitals, and "to give women the possibility of deciding [for] themselves the question of motherhood."\(^{44}\) Such rapid swings in the nature of abortion policy are remarkably different from the more evolutionary approach seen in the history of Western countries.\(^{45}\) Of course, the recent and rapid changes in the organization of the Soviet states may once again impact abortion laws.

An understanding of the scheme of rights is important before one can examine the right to abortion in the Soviet system. The concept of "right" in former Soviet law is translated from "prava," a Russian word that also means law.\(^{46}\) "Right" in this subjective sense means the

\footnotesize{
\begin{itemize}
  \item years after it comes into force or on such earlier date as may be specified in the declaration.
  \item Parliament or the legislature of a province may re-enact a declaration made under subsection (1).
  \item Subsection (3) applies in respect of a re-enactment made under subsection (4).
\end{itemize}


\(^{45}\) J.A. McMahon, \textit{Abortion, Asking the Rights Question?}, 18 Victoria U. Wellington 201, 205 (1988).

\(^{46}\) Savage, \textit{supra} note 43, at 1031.
}
possibility for a person or organization to engage in certain conduct which is provided by a legal norm and protected by the state.\textsuperscript{47} Rights in the former Soviet Union did not have consistent meaning or content and depended on the circumstances at the instant point in history. As a consequence, the form or expression of a right could be the same at different points in history, but the meaning of the right changed as the material, social, and historical circumstances of the individual and the society changed.\textsuperscript{48}

These distinctions may not remain after the sweeping changes in the former Soviet Union. The abortion right as a constitutional guarantee was not provided for in the recent Federative Treaty. This absence is explained by the need to enact a form of government before specifying the rights meted out by that government. Considering the history of abortion discussed supra, it will be presumed that the abortion right will be enforced as it has been in the past.

The Soviet Union has generally been characterized as a society in which abortion is permitted at the unconditional request of the woman,\textsuperscript{49} and in which the most significant aspect has been the plethora of abortions.\textsuperscript{50} It has been estimated that four out of five pregnancies of Soviet women end in abortion, averaging nine abortions over the course of a Soviet woman's life.\textsuperscript{51} It is estimated that somewhere between nine million and eighteen million abortions occur each year in the former Soviet Union.\textsuperscript{52} The enormous scale of abortion is more a result of the unavailability of adequate contraception than any respect for the right of women to control their bodies.\textsuperscript{53} Consequently, the use of abortion as a form of birth control is deeply ingrained.\textsuperscript{54} In essence, abortion is regarded as an inevitability regardless of legal status.\textsuperscript{55}

Under Soviet law as it existed prior to the formation of the Soviet federation, "the government permit[ted] abortion upon request within the first twelve weeks of conception and [did] not require specific juridical or socioeconomic grounds for abortion."\textsuperscript{56} The 1955 Decree laid down the following restrictions on the availability of abortions:

\begin{itemize}
  \item \textsuperscript{47} \textit{Id.}
  \item \textsuperscript{48} \textit{Id.}
  \item \textsuperscript{49} Mezey, \textit{infra} note 149, at 693.
  \item \textsuperscript{50} Lawrence H. Tribe, Abortion: The Clash of Absolutes 56 (1990).
  \item \textsuperscript{52} \textit{Women's Medical Center Gives Russian Women New Choices}, PR Newswire, Sept. 29, 1992.
  \item \textsuperscript{53} \textit{Id.}
  \item \textsuperscript{54} Savage, \textit{supra} note 43, at 1063.
  \item \textsuperscript{55} Tribe, \textit{supra} note 50, at 57.
  \item \textsuperscript{56} Savage, \textit{supra} note 43, at 1060.
\end{itemize}
i. abortions are to be performed only in licensed medical institutions;
ii. a woman seeking an abortion must first receive a certificate from a doctor which confirms that an indication for an abortion exists [i.e., a threat to the life or health of the mother or where a threat exists to the health of the fetus];
iii. before the operation, the reasons for the application and the possible adverse medical consequences are discussed with the woman.57

After twelve weeks, abortion was permitted rarely and only for medical reasons endangering the mother’s life or health or for genetic defects, hereditary disease, and such.58 Thus, an abortion had to be performed in a state hospital, and penalties were applied only to doctors who performed abortions anywhere other than in state hospitals.59

Administrative regulations required that a midwife counsel every woman who wanted to have an abortion and approve the request for the abortion.60 Further procedural requirements included the consent of the woman, performance of the abortion in a hospital or other lawful establishment, and a small fee in the case of legal abortions undertaken for other than medical reasons.61

The government in the past, as regulator of individual rights, limited a woman’s ability to obtain an abortion by placing a number of obstacles in her path.62 Women who could not meet the criteria were forced to seek illegal abortions.63 Approximately seventy percent of women in cities and ninety percent of women in rural areas who terminated their first pregnancies by abortion chose illegal abortions.64

The question remains whether abortion will have the status of a constitutional or legislative right in the individual Soviet states. It appears that because abortion has become a normal part of Soviet society, abortions will continue to be prevalent. The present system of legislative control may continue, but the number of obstacles placed in the path of women seeking to obtain an abortion will be reduced because the government will no longer have the role of regulator of rights under the new Federation of Soviet States. The individual Soviet states may choose to answer the abortion question by elevating abortion to the

57. McMahon, supra note 45, at 203.
60. Savage, supra note 43, at 1060.
61. Id.
62. See supra text at notes 57-61.
63. McMahon, supra note 45, at 207.
64. Savage, supra note 43, at 1062.
status of a constitutional right and accordingly enacting such protection in their individual constitutions.

B. India

India is a federal democratic republic consisting of twenty-five states and seven territories which exist within a constitutional system of checks and balances. Although the 1949 Indian Constitution contains many centralizing features with regard to policy-making and governmental structure, the Indian federal framework gives significant autonomy and home rule to ethnic, linguistic, religious, and other group interests. The states do not have individual constitutions but are governed under the relevant provisions of the Indian constitution, which sets forth the basis for state governmental organization and powers. Under the Indian constitution, the head of the Indian government is the president, who is nominally vested with the executive power. The legislative power is vested in a bicameral Parliament composed of the Council of States, the Rajya Sabha, and the House of the People, the Lok Sabha. All courts in India form a single hierarchy, with the Supreme Court of India as the highest court of appeal.

Laws were enacted in 1971 allowing abortion. These laws came into effect in 1972 in the Medical Termination of Pregnancy Act, “which permit[ted] abortions when it is likely that the child will be born with significant physical or mental abnormalities or when the birth poses a threat to the physical or mental health of the woman.” The latter category has been broadly interpreted to provide unrestricted access to abortions. India currently provides women with free abortions, including those performed at state-owned hospitals.

Unlike in the West, abortion in India is not regarded as a part of a woman’s natural right to bodily autonomy. Abortion is primarily viewed by the government as a solution to India’s mounting health, population, and illegal abortion problems. Women in India view abor-

66. Id. at 119.
67. Id. at 121.
68. Id. at 119.
69. Id.
70. Francome, supra note 44, at 156.
71. Tribe, supra note 50, at 63.
72. Id.
74. Tribe, supra note 50, at 63.
tion as a means of eliminating female fetuses to avoid burdening the family with the obligation of an expensive dowry. In a number of Asian countries the use of amniocentesis to determine the gender of an embryo and the consequent abortion of female fetuses has become increasingly common.\textsuperscript{75} This problem has appeared most markedly in India where there exists a strong preference for sons and free access to amniocentesis and abortion.\textsuperscript{76} This practice has raised a peculiar dilemma for Asian feminists and others who see abortion in terms of a woman's right to bodily autonomy. These feminist groups are put in the position of defending a woman's right to an abortion even at the expense of female fetuses. One solution suggested to curb sex-selective abortions is to restrict the availability of amniocentesis and other sex determinative tests.\textsuperscript{77}

In 1988, the government of the Indian state of Maharashtra (of which Bombay is the capital) passed a law permitting amniocentesis only if the woman is at least thirty-five years old or has a medical or family history that suggests the likelihood of genetic disorders.\textsuperscript{78} This legislation was prompted in part by a survey completed in 1988 which revealed of the eight thousand abortions carried out in Bombay, 7,999 were female fetuses.\textsuperscript{79} Groups that continue to support abortion upon request argue that such legislation impinges upon the relationship between a doctor and patient and unduly restricts a woman's right to have an abortion for her own reasons.\textsuperscript{80} In addition, some of these groups allege that since women are oppressed in Indian society, sex-discriminatory abortions may be a benefit to the female fetus.\textsuperscript{81} Others suggest that significant reductions in the female population may serve to improve the status of women in Indian society. Contrarily, those groups concerned with the implications of sex-discriminatory abortions point out that women can go to other states to have such tests performed.\textsuperscript{82}

Legislation was filed in Parliament at the urging of the Indian government in August 1992, to place restrictions on the use of tests that determine the sex of a fetus.\textsuperscript{83} The purpose of the restrictions would

\textsuperscript{75} Id. at 65.
\textsuperscript{76} Id.
\textsuperscript{77} Id.
\textsuperscript{78} Id.
\textsuperscript{80} Tribe, supra note 50, at 65.
\textsuperscript{81} Id.
\textsuperscript{82} Id.
be to check the increasing abortion of female infants. Under the proposed legislation, prenatal diagnostic tests would be confined to registered health centers, and testing solely for the purpose of determining a fetus’s sex would be banned. Currently, final action has not been taken on this legislation.

The Indian Supreme Court has failed to consider the abortion issue and, in light of current legislation, is unlikely to address the issue in the future. It is feasible the restrictions on the use of the amniocentesis procedure will be passed by Parliament because of the dramatic shifts in the demographics of Indian society due to the decreasing number of females born each year.

C. Australia

The framers of the Australian Constitution used two models for their new constitution: the American and the Canadian documents. They preferred the American example; although they omitted two significant features of the American Constitution, that is, a Bill of Rights and the presidential system. An Australian Bill of Rights has been proposed but has yet to be passed into existence.

Generally, Australia has a federal structure similar to the United States. The legislative power of the Commonwealth in Australia is vested in a bicameral federal Parliament as set forth in the Australia Constitution of 1900 and executive power, though formally vested in the Governor-General, is actually vested in the federal cabinet.

The Federal Supreme Court is the highest court in the Commonwealth of Australia. Each state and territory of Australia has its own court system which is hierarchically structured downward from the state supreme court.

87. Id.
90. “The [Australia Supreme] Court has jurisdiction over all matters arising under treaties or affecting foreign representatives, matters between states, matters to which the Commonwealth is a party, and matters between residents of different states. The High Court has acquired the power of judicial review of the constitutionality of certain laws enacted by Parliament, state parliaments, and administration of the territories by inference from the federal constitution.” Id. at 24.
91. Id. at 157.
Given the lack of a Bill of Rights or national law on abortion, the failure of the Australian Supreme Court to announce national legal standards and rights and the national legislature's failure to pass national abortion legislation have left each state free to implement its own abortion scheme. Abortion is technically illegal in most Australian states, but courts give doctors wide discretion to perform abortions they think appropriate.

The states of the Commonwealth of Australia are New South Wales, Victoria, Queensland, South Australia, Western Australia, and Tasmania. Individually, they have generally found a right to an abortion based on whether the woman's mental health is endangered by the pregnancy. The parameters of this right vary from state to state.

The first state to pass a more liberal abortion law was South Australia in 1969. Its act allowed abortion if two doctors agreed that "continuance of the pregnancy would involve greater risk to the life of the pregnant woman or greater risk of injury to the physical or mental health of the pregnant woman than if the pregnancy were terminated."

In Victoria, the same result was achieved judicially in R. v. Davidson, a 1969 case in which the state supreme court concluded that an abortion was not unlawful where there was danger to the woman either physically or mentally. The accused was charged with four counts of unlawfully using an instrument to procure the miscarriage of a woman and one count of conspiring to procure the miscarriage of a woman. The court specified that for therapeutic abortion to be lawful, "the accused must have honestly believed on reasonable grounds that the [abortion] was necessary to preserve the woman from some serious danger." The court then extended the element of danger to include not only danger to life but also danger to physical or mental health other than the normal dangers of pregnancy and childbirth.

In New South Wales, the law in operation from 1900 allowed abortion if the woman's life or mental or physical health was judged to be endangered by the pregnancy. Mental health was considered to include social and economic stress on the woman.

92. Tribe, supra note 50, at 68-69.
95. Francome, supra note 44, at 151.
96. Id.
98. Id.
99. Id. at 671.
100. Francome, supra note 44, at 151.
A recent case appealed from the Supreme Court of Queensland to the High Court of Australia elucidates the general Australian position regarding abortion, although it fails to enunciate a national legal standard. Mr. Kerr sought to restrain a woman from obtaining an abortion when she was six weeks pregnant. He claimed the child was his, although the woman and Kerr were not married or living together, and they had intercourse on only one occasion. The court found it unjustifiable to allow the injunction because to do so would "interfere in the most serious way with her (the woman's) liberty of action." The court also stated, in agreeing with another Australian jurist, that a fetus has no rights until it is born and exists apart from its mother. The court stated: "There are limits to the extent which the law should intrude upon personal liberty and personal privacy in the pursuit of moral and religious aims. Those limits would be overstepped if an injunction were to be granted in the present case." There is significant demand in Australia for national legislation and standards regarding abortions, primarily because federal funding for abortion is widely available. A judge in a recent decision in the state of Victoria determined that the fetus had no right to be born when deciding whether a husband could prevent his wife from having an abortion. The husband had applied to a court in northern Australia's Queensland state for an injunction preventing his estranged wife, who was five months pregnant, from aborting their child. The case turned on whether the fetus had rights under common law. The judge concluded it did not. The right to an abortion in Australia is legislatively based and restricted. The legislation is, in effect, state and common law based. Abortion, as a right, has not been provided for in the Australian constitution nor by the Australian Parliament. However, this omission has allowed the individual Australian States to implement their own abortion laws that generally grant women the right to an abortion.

D. China

The word for "right" in the People's Republic of China is "quan," which means, remarkably, both the rights of citizens and the powers

102. Id. at 277.
104. Id. at 278.
105. Tribe, supra note 50, at 69.
107. Id.
108. Id.
of the state.\textsuperscript{109} In China, rights inhere in citizenship and only citizens enjoy rights. The instability of rights in general in China is important in the evaluation of the abortion right in that country.

In March 1978, the Fifth National People's Congress adopted a new Constitution. Article 53 of the Constitution provides that the state supports family planning.\textsuperscript{110} The article reads:

Women enjoy equal rights with men in all spheres of political, economic, cultural, social and family life. Men and women enjoy equal pay for equal work. Men and women shall marry of their own free will. The state protects marriage, the family, and the mother and child. The state advocates and encourages family planning.

However, the Constitution also provides that freedom and rights may not infringe upon the interests of society and the collective. Thus, rights exist only when the state creates them and grants them to citizens. Rights have no independent basis in human nature or human conditions.\textsuperscript{111} Inherent in this reality is the instability of a right. Specific rights are "freely" given if deemed to be in the state's best interest and are withdrawn when their purpose is served.\textsuperscript{112} Administrative regulations that have implemented laws and established the content of rights change as quickly as the state reevaluates the effect of the regulations on the state's interest. Further, the content of a right may change as Party policy changes or as statutes or regulations change.\textsuperscript{113} Essentially, rights are creatures of the state that are held by citizens. Their content and limits are determined only by the needs of the government at any point in time. A citizen has no rights that the state has any duty to protect other than those of the worker consistent with the superior interest of the people—the socialist good.\textsuperscript{114}

Abortion was legalized by a directive from China's Minister of Health in 1957 to control population growth, raise living standards, and continue the effort to industrialize.\textsuperscript{115} The People's Republic of China prohibits the birth of more than one child per family.\textsuperscript{116} If economic

\textsuperscript{109} Savage, supra note 43, at 1069.
\textsuperscript{110} 2 Honguo Xianfa Art. 53 (1980), translated in I Laws and Regulations of the People's Republic of China 1, 14 (1982).
\textsuperscript{111} Savage, supra note 43, at 1069.
\textsuperscript{112} Id.
\textsuperscript{113} Id.
\textsuperscript{114} Id. at 1072.
\textsuperscript{115} Francome, supra note 44, at 132.
\textsuperscript{116} Savage, supra note 43, at 1091.
incentives do not motivate birth control, abortion is used to end any pregnancies that violate the state’s policy. Therefore, abortion is state mandated when a woman who already has one child becomes pregnant. Recently, a pregnant Chinese woman fled to Australia by boat and survived a desert trek to seek asylum for fear of a forced abortion in her home country.

China’s one family, one child rule and compulsory abortion policies greatly undermine the rights accorded to female children, similar to the situation in India. The failure to bear a son is a tragic failure to a Chinese couple, resulting in a loss of someone to carry on the family name and other Chinese customs. The result has been that couples to whom daughters have been born have increasingly resorted to the drowning or abandonment of their infant girls in order to be entitled to another chance to have a son.

China allows women to obtain abortions in order to achieve governmental objectives. This availability would qualify as a legislative right. Although the right may be eliminated by ordinary governmental action, given the problem of population growth faced by the Chinese, the possibility of the state eliminating a woman’s ability to seek an abortion is unlikely. China is unusual because abortion is state mandated and enforced where a family already has one child. However, family planning officials indicate they are ready to ease the country away from its controversial one-child policy because of international criticism and the increasing resistance of its citizens to the state-mandated abortion policy.

E. Israel

Although into its fortieth decade of independence, Israel has yet to formalize its constitutional principles into a written document. In the country’s formative years, its leaders heatedly debated the need for a formal constitution. There were efforts to draft a constitution and one draft contained an abridged chapter on fundamental rights, similar to the Bill of Rights in the United States Constitution. However, the

117. Id. at 1092.
119. Tribe, supra note 50, at 62.
120. Id.
121. Id.
end result was what one author has called the "Great Israeli Compromise: Creeping Constitutionalism." The compromise resolution was named the "Harari Resolution" and endorsed the idea of a constitution while setting forth a vague process for the constitution's piecemeal preparation. Due to political conflicts, no constitution was enacted.

Israel is a nation that has gradually moved from imposing significant criminal penalties on abortion to a system with relatively few restrictions. As a nation, Israel has not formally debated the abortion question, because of the religious restrictions in the nation's political and legal systems. Thus, until relatively recently, Israel retained restrictive abortion laws on its books, and most abortions were performed privately and illegally.

This matter is further complicated by the presence of two opposing views in the Jewish faith toward abortion. According to one view, the fetus is not considered a life until it is born, and it may be destroyed in order to preserve the life of the mother. Under the other view, where no mitigating circumstances exist and the reason for an abortion is to avoid a financial or emotional inconvenience, Jewish law clearly forbids the taking of potential life.

In 1966, the abortion law was liberalized to the extent that it was no longer a crime for a woman to obtain an abortion. The District Court of Haifa ruled that abortions openly performed on bona fide medical grounds were permissible. Although abortions were permissible for medical reasons after 1966, the criteria for obtaining an abortion

125. Levy, supra note 123.
126. The Resolution reads, "The first Knesset charges the Constitutional Legislative and Judicial Committee with the duty to prepare a draft Constitution for the State. The Constitution shall be composed of individual chapters in such a manner that each of them shall constitute a basic law in itself. The chapters shall be brought before the Knesset to the extent which the Committee will terminate its work and all chapters together will form the State Constitution," cited in Amos Shapira, Judicial Review Without a Constitution: The Israeli Paradox, 56 Temp. L.Q. 405, 410 (1983).
127. Id.
128. Mezey, infra note 149, at 694:
129. Id. at 694 n.30.
131. Shlomo Riskin, The Fetus as Potential Killer, The Jerusalem Post, Feb. 8, 1991, citing the Mishnayot Ohalot 7:6, "If a woman suffers a difficult childbirth, we are allowed to destroy the fetus in the woman removing the fetus limb by limb, because the mother's life takes precedence over the child's. But if the head (or major portion of the body) of the child has emerged, the newborn cannot be harmed because one life cannot push aside another life."
132. Id.
133. Slater, supra note 130, at 411.
134. Francome, supra note 44, at 147.
were not clearly defined, and most women were thus forced to obtain abortions privately and illegally.\textsuperscript{135}

Hospitals established "pregnancy termination committees" to consider abortion requests. These committees consisted of gynecologists, psychiatrists, and social workers that gradually developed similar reasons for granting an abortion. These criteria generally consisted of: 1) danger to the health or life of the mother; 2) anticipated malformation of the fetus; 3) rape, adultery, incest; and 4) problems caused to the mental or social health of the mother.\textsuperscript{136}

In 1977, the Israeli Parliament, the Knesset, repealed the 1936 Criminal Code section relating to abortion and enacted the Penal Law Amendment on Interruption of Pregnancy which exempted from prosecution abortions performed by a doctor with the approval of a committee composed of two doctors and a social worker.\textsuperscript{137} The purpose of the amendment was to abolish the discrepancy between the total prohibition according to the Criminal Code Ordinance of 1936 and the extremely different reality.\textsuperscript{138}

The basic criteria of the hospital committees were codified in the penal law amendment which also gave legal standing to the hospital abortion committees.\textsuperscript{139} A committee composed of two physicians and a social worker, once satisfied that the woman has given her informed consent, must find one of five justifications.\textsuperscript{140} The most important of these dealt with danger to the woman's physical or mental health or with contributing to a woman's difficult social or family situation. Further, the law provided that no criminal penalty attached if an abortion was urgently required to save the mother's life, to prevent grievous harm, or to satisfy a need that unexpectedly arose during the course of an operation.\textsuperscript{141}

\textsuperscript{135} Id.
\textsuperscript{136} Id.
\textsuperscript{137} Mezey, infra note 149, at 695.
\textsuperscript{139} Slater et al., supra note 130, at 411.
\textsuperscript{140} The Israeli Penal Law Amendment, § 5, reads,
The committee may after obtaining the woman's informed consent, approve the interruption of pregnancy if it considers it justified on one of the following grounds: 1) the woman is under marriage age or has completed her fortieth year; 2) the pregnancy is due to relations prohibited by the criminal law or incestuous relations, or extramarital relations; 3) the child is likely to have a physical or mental defect; 4) continuance of the pregnancy is likely to endanger the woman's life or cause her physical or mental harm; 5) continuance of the pregnancy is likely to cause grave harm to the woman or her children owing to difficult family or social circumstances in which she finds herself or which prevail in her environment.
\textsuperscript{141} See also Falk, supra note 138.
In spite of the allegedly broad nature of the exemptions, large numbers of applicants are in fact denied permission because they fail to conform to these criteria. If none of the exceptions apply, abortions remain illegal and punishable with a possible penalty of five years imprisonment or a fine of fifty thousand pounds. The woman is exempted from responsibility for an unlawful abortion under section 9 of the Israeli Abortion Law.

In 1979, section 5 was repealed because of political deal-making. Forty-three percent of abortions were performed under this exception for family or social circumstances of the woman. Although this exception was repealed to reduce the number of abortions, it actually did not because women simply obtained illegal abortions.

Thus, in Israel, women have a limited legislative right to an abortion. Israel has specifically enacted legislation, which in the absence of a written constitution, enables women to obtain abortions upon meeting certain criteria. However, women who cannot receive the necessary approval can obtain illegal abortions from private doctors and will often choose this option because they are not subject to punishment for obtaining abortions. Thus, although one of the criteria for obtaining an abortion was repealed, it did not decrease the number of abortions because more women chose to obtain illegal abortions.

III. An Answer for Germany

Germany must resolve the abortion question in order to finally complete the process of unification it began in October of 1992. One writer, Susan Gluck Mezey, argues that the scale of abortion rights varies on a spectrum between two extremes. On one end of the spectrum, the state determines the status of the fetus by criminalizing the abortion procedure and imposing governmental penalties upon those who perform or obtain abortions. At the other end of the spectrum, the state is

142. Id.
143. The Israeli Law reads, "A person who knowingly interrupts a woman's pregnancy, either by medical treatment or in any other manner, shall be liable to imprisonment for a term of five years or a fine of fifty thousand pounds." Laws of State of Israel Special Volume, Penal Law 5737-1977, Ch. 10, Art. 2, § 313.
144. Falk, supra note 138. Section 9 of the Penal Law Amendment reads, "A woman upon whom an offence under this Law is committed shall not bear criminal responsibility in connection with that offence."
146. Id.
147. Id.
148. Id. at 149.
completely removed from the decision-making process, and the matter is placed entirely in the hands of the pregnant woman by allowing her to decide whether or not to bear the child. However, this analysis fails to recognize those countries in which the state removes itself from the decision-making process, but allows regulation within the country by other governmental units. An example of one such country is Australia in which individual states have the power to restrict or enlarge the abortion right. The spectrum analysis also fails to account for governments in which abortion is state mandated under certain circumstances, such as China.

The competing interests in the abortion question can be better analyzed by using the shape of a pyramid. The abortion pyramid helps to identify the competing elements in the abortion question and thus a possible resolution to the German crisis may be proposed after positioning the countries previously discussed on such a pyramid.

ABORTION PYRAMID

150. Id.
On one side of the pyramid, the interests of the mother are recognized as predominant. Countries which establish their abortion policies based on the best interest or danger to the mother form this side of the pyramid. Such countries include Canada where criminal code provisions limiting women's access to abortion were struck down as infringing on a woman's constitutionally guaranteed right to life, liberty, and security of the person. The former Soviet Union is another example of a country which recognized the right and interest of the mother over the other interests on the pyramid. Abortion was first liberalized in the former Soviet Union to allow women to decide about motherhood and to provide for safe conditions in which to obtain abortions. Similarly, Israel is a country in which the mother's interests dominate because abortion is allowed when a pregnancy causes danger to the woman's physical or mental health or contributes to difficult social or family circumstances of the woman.

Countries in which the interest of the fetus is recognized form the second side of the pyramid. West Germany is placed onto this side of the pyramid because the fetus's life was recognized as paramount to any other interest, and criminalization of the abortion procedure ensued. In West Germany, the court granted the fetus protection under its constitutional provision that “Everyone shall have the right to life.”

The third side of the pyramid is formed by those countries in which the abortion right is determined according to the interest or directive of the government. One example of such a regime is China, where abortion is freely allowed to further the government’s one child per family rule. China’s committed enforcement of its one child policy leads to forced abortions where a woman who already has one child becomes pregnant. Thus, the interest of the government in controlling population growth outweighs the interests of both the mother and the fetus. Another country which could be placed on this side of the pyramid is India, where the government is urging restrictions on the use of sex-determinative tests in order to halt the disproportionate abortion of female fetuses. Accordingly, the Indian government deems its interest in maintaining normal male to female ratios in its society to override the family’s or mother’s interest. In addition, a system such as Australia’s may also be considered to fall on this side of the pyramid. The government in Australia has failed to recognize either the interest of the mother or the fetus. By default, the government has chosen to remove itself from the decision making process and allow individual states to expand or limit a woman’s ability to obtain an abortion. Consequently, the government recognizes its own interest in being insulated from the abortion question rather than recognizing the interest of the fetus or the mother.

The question must now be answered. Where on the abortion pyramid must Germany place itself? West German law found the interest of the fetus to predominate. East German law found the interest of the mother
to predominate by allowing abortion on demand within the first three months of pregnancy. In the midst of these two competing traditions, the new German law must avoid the throes of the abortion paradox in which compromise between the three sides of the pyramid achieved in the name of a long-term solution prevents any resolution from achieving longevity. Generally, a compromise in which a country places itself at an apex of the pyramid rather than recognizing one of the competing interests as superior is doomed to last only until one of the interests attains superior status. For example, Canada’s attempt at compromise in 1969 was invalidated in the Morgentaler decision, and the result has been a state of “lawlessness” because of a failure to answer the abortion question. Germany’s Federal Constitutional Court bears the enormous burden of deciding which side of the abortion pyramid is most appropriate for the reunified Germany.

The best choice for Germany’s social and political future is one cognizant of the need for effective unification. The easiest political solution would be for the Federal Constitutional Court to judicially enact the legislation passed by the Bundestag. The legislation was designed to allow women access to abortion with the requirement that a woman obtain counseling at least three days prior to obtaining the abortion. This action would place Germany on the side of the abortion pyramid recognizing the interests of the mother. This solution would facilitate long-term acceptance of the decision due in part to its emergence from the democratic process. The legislation had been passed by the German Parliament and signed into law. A resolution to the abortion question as a result of the legislative process is unusual in constitutional countries such as Germany where an answer generally emerges from the courts due to the unwillingness of other branches of government to act or to act in cooperation. Thus, the German court’s willingness to judicially enact legislation could establish an unusual “alliance” between judicial and legislative determination of the abortion question. This combination could facilitate a positive solution to Germany’s dilemma and may allow Germany to avoid the abortion paradox and finally find an answer to the question of abortion.

However, West Germany, because of increased wealth, size, and population, has in many ways subsumed East German culture during the process of unification. The West German tradition that the interest of the fetus should prevail is likely to cause continued conflict if the solution herein proposed is adopted. This fact is characteristic of the reality that there is no easy answer to the abortion question.

Terri E. Owens